

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

Melissa A. Miller, :  
Plaintiff, :  
v. : Case No. 2:08-cv-0115  
Michael J. Astrue, : JUDGE MARBLEY  
Commissioner of Social Security, : MAGISTRATE JUDGE KEMP  
: Defendant.

ORDER

This matter is before the Court to consider de novo plaintiff's objections to a Report and Recommendation of the Magistrate Judge recommending that judgment be entered in favor of the defendant Commissioner. For the following reasons, those objections will be overruled and judgment will be entered for the defendant.

None of plaintiff's three objections requires a lengthy discussion. Plaintiff's objections are similar to the issues she raised in her statement of errors - that she should have been found disabled based on the testimony of the vocational expert, that she may have satisfied the requirements for disability under Listing 12.04, and that the Commissioner erred by not calling a medical expert to testify at the administrative hearing.

As both the Report and Recommendation and the Commissioner's response to plaintiff's objections note, however, the first argument is flawed because the question posed to the vocational expert which elicited the response that plaintiff could not work contained a limitation - being off task for up to one-third of the work day - which was not part of the Commissioner's residual functional capacity assessment, and which was not necessarily the equivalent of a finding that plaintiff had moderate limitations

in several work-related areas. The second argument indicates nothing more than a disagreement with the Commissioner about which medical or treating source to believe, and the Commissioner has broad discretion to make that choice when there is evidence in the record which supports conflicting assessments about the degree of plaintiff's limitations. Finally, this Court is not persuaded that the state of the medical evidence required the Commissioner to seek clarification from a medical expert. The Commissioner was faced, again, with conflicts in the evidence, and articulated legitimate reasons for crediting those sources which found that plaintiff, although limited by her mental impairment, could still do the type of work-related activities which, according to the vocational expert, were consistent with the demands of some jobs. That testimony, in turn, provided the foundation for the Commissioner's decision that plaintiff was not entitled to benefits based on disability.

For these reasons, plaintiff's objections (#15) to the Report and Recommendation of the Magistrate Judge are OVERRULED, and the Report and Recommendation is ADOPTED. The plaintiff's statement of errors is OVERRULED, the decision of the Commissioner is AFFIRMED, and the Clerk is directed to enter judgment in favor of the defendant.

s/Algenon L. Marbley  
Algenon L. Marbley  
United States District Judge